STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN,	File No. 20-3171-FY
Plaintiff,	Hon. Thomas D. Wilson
v	
PAUL EDWARD BELLAR,	
Defendant.	

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DEFENDANT'S OBJECTION TO THE PEOPLE'S GOECKE MOTION TO AMEND THE INFORMATION

NOW COMES the Defendant, Paul Edward Bellar, by and through his attorney, Andrew P. Kirkpatrick of Dungan & Kirkpatrick, P.L.L.C., and is support of his objection, states as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied for reasons the same or untrue. Mr. Bellar would further state that the District Court Judge was correct in his ruling to deny the charge and did not abuse his discretion.

5. Mr. Bellar objections further rely on the attached brief in support.

Dated: July 19, 2021

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BRIEF IN SUPPORT OF DEFENDANT'S OBJECTION TO THE PEOPLE'S GOECKE MOTION TO AMEND THE INFORMATION

ARGUMENT

I. The District Court did not abuse its discretion or error as a matter of law in failing to bind over defendant, Paul Bellar, on the charge of making and communicating a terrorist threat, contrary to MCL 750.543m(1). This Court should deny the People's request to reinstate/add this charge against Mr. Bellar.

A. Standard of review of a bind over decision.

MCL 766.13 provides in relevant part:

> If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony.

At a preliminary examination, the prosecution must present evidence establishing that the defendant committed the charged offense, and the district court must find that probable cause exists to bind over a defendant for trial. *People v. Shami*, 501 Mich. 243, 250-251 (2018). To satisfy this burden, the prosecution must present evidence of each and every element of the charged offense, or enough evidence from which an element may be inferred. *People v. Seewald*, 499 Mich. 111, 116, (2016). Accordingly, to warrant a bind over, the prosecution must produce evidence that a crime was committed and that probable cause exists to believe that the charged defendant committed it.

Probable cause is established if the evidence would persuade a careful and reasonable person to believe in the defendant's guilt. *People v. Yost*, 468 Mich. 122, 126 (2003). Evidence supporting that the defendant perpetrated the crime may be circumstantial, but must nevertheless demonstrate reasonable grounds to suspect the defendant's personal guilt. *People v. Tower*, 215 Mich. App. 318, 320 (1996). The evidence considered must be legally admissible. *People v. Walker*, 385 Mich. 565, 575-576 (1971), overruled on other grounds by *People v. Hall*, 435 Mich. 599 (1990).

A Preliminary Examination should function to "weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial and of the deprivation of his liberty if there is no probable cause for believing he is guilty of the

crime." *People v Duncan,* 388 Mich 489, 501 (1972) (overruled on other grounds), quoting 21 Am Jur 2d, Criminal Law, Sec. 443, pgs. 446-447.

The Michigan Supreme Court has suggested that a denial of bind over is appropriate where it appears the prosecution will not be able to convict the accused at trial. *People v Goecke,* 457 Mich 442, 468-469 (1998): "More important, for purposes of avoiding the temptation to overcharge, it does not dilute the prosecutor's responsibility to be mindful that '[t]he preliminary examination should identify not simply those who are probably guilty but more precisely those who are probably convictable.' MCR 6.107 (now 6.110), Commentary to the Proposed Rules of Criminal Procedure, 422A Mich 31 (1985)."

The Court of Appeals has also suggested that the probable cause standard required for a bindover following Preliminary Examination should also involve the issue of whether the case is likely to result in a conviction. *People v Cohen,* 294 Mich App 70, 75-76 (2011): "it has been stated both that the probable cause required for a bindover is 'greater' than that required for an arrest and that it imposes a different standard of proof....[T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing and to the probability that the government will be able to establish guilt at trial. [LaFave & Israel, Criminal Procedure (2d ed., 1992), § 14.3, pp. 668–669 (citations omitted).]."

B. The District Court did not error as a matter of law and did not incorrectly deny the People's request to bind over Mr. Bellar on the charge.

The District Court did not error as a matter of law and did not incorrectly deny the People's request for a bind over.

MCL 750.543z. states as follows:

> Notwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.

While statements made by Mr. Bellar in PRIVATE chat rooms and at PRIVATE meetings with other individuals associated with the Wolverine Watchmen may have been inappropriate, vehement, caustic or unpleasantly sharp, they must still rise to the level of a "true threat".

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. Amend. I. " '[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *United States v Alvarez,* 132 S. Ct. 2537, 2543 (2012) (quoting *Ashcroft v American Civil Liberties Union,* 535 U.S. 564, 573 (2002).

The First Amendment protects name-calling. *See Wright v South Ark. Reg'l Health Ctr., Inc.,* 800 F.2d 199, 204 (8th Cir. 1996). The First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks" as well as language that is "vituperative, abusive, and inexact." *Watts,* 394 U.S. at 708. Further, the First Amendment protects such speech even though "it may embarrass others or coerce them into action." *NAACP v Claiborne Hardware Co.,*458 U.S. 886, 910 (1982). Thus, "threats of vilification or social ostracism" are protected by the First Amendment. *Id.*

It is only when speech crosses the line separating insults from "true threats" that it loses its First Amendment protection. *See Virginia v Black,* 538 U.S. 343, 359 (2003); *Watts v United States,* 394 U.S. 705, 707 (1969); *D.J.M. ex. Rel. D.M. v Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d 754, 764 (8th Cir. 2011); *Riehm v Engelking,* 538 F.3d 952, 963 (8th Cir. 2008); *See also United States v Koschuk,* 480 Fed. App'x 616, 617 (2nd Cir. 2012), *cert. Denied,* 133 S. Ct. 902 (2013); *United States*

v White, 670 F.3d 498, 526 (4th Cir. 2012); *United States v Stewart,* 420 F.3d 1007, 1016 (9th Cir. 2005); *United States v Nishnianidze,* 342 F.3d 6, 16 (1st Cir. 2003); *United States v Landham,* 251 F.3d 1072, 1080 (6th Cir. 2001).

A "true threat" constitutes one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v New Hampshire,* 315 U.S. 568, 571-72 (1942); *see Alvarez,* 132 S. Ct. At 2544 (recognizing that true threats are one of the few " 'historic and traditional categories [of expression]' " in which content-based restrictions on speech is permitted); *United States v Williams,* 690 F.3d 1056, 1061 (8th Cir. 2012) (noting that true threats are one of the "discrete categories of content-based restrictions on speech" permitted under the First Amendment).

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence **to a particular individual or group of individuals**." *Black,* 538 U.S. at 359; *see United States v Mabie,* 663 F.3d 322, 330 (8th Cir. 2011). The "**prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders**, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (internal quotations omitted).

The "true threat" doctrine originated in *Watts,* where the petitioner appealed his conviction for violating 18 U.S.C. Section 871, which prohibits any person from "knowingly and willfully ... [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." *Watts,* 394 U.S. at 705-05. The petitioner's conviction was based on the following statement made by Watts, during an anti-Vietnam War rally: "They always holler at us

to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706.

The Supreme Court reversed, concluding that the petitioner's speech was not a "true threat."

After recognizing the nation's valid, "even overwhelming," interest in the President's life, the Court observed:

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

Id. at 707. The Court went on to hold that,

" 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials, ' " *id.* at 708 (citation omitted), the petitioner's speech did not rise to the level of "true threat" and was thus protected by the First Amendment. *Id.*

In the case at bar, the People cite *People v Osantowski*, 274 Mich App 593, (2007)

In that case, the Court defined "true threats":

" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359, 123 S.Ct. 1536. "The speaker need not actually intend to carry out the threat. **Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,'** in addition to protecting people 'from the possibility that the threatened violence will occur.' " Black, supra at 359–360, 123 S.Ct. 1536, quoting RAV v. City of St. Paul, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

This was further explained and defined in *People v Ostantowski*, 481 Mich 103, (2008). This was an appeal from *People v Osantowski*, cited above. It was regarding scoring of OV 20 as it relates to acts of terrorism. The court set forth the following:

> Under MCL 750.543b, a threat may constitute an act of terrorism; acts of terrorism must be violent felonies as defined by MCL 750.543b(h), which specifies that a violent felony is one that includes as an element the "threatened use of physical force ... or the ... threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device." But not all threats are acts of terrorism, even if they qualify as violent felonies. To constitute an act of terrorism, a threat must be a violent felony and also must itself be "a willful and deliberate act" that the offender "knows or has reason to know is dangerous to human life" and **"that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.**" MCL 750.543b(a). *People v Osantowski*, 481 Mich 103, 109 (2008).

Where the People miss the point on the case at bar is that these "threats" where never made public to anyone. They were on private chats and private meetings, and even then, as it pertains to Mr. Bellar, was nothing more than just talk. There were no individuals that suffered "fear of violence or disruption that fear engenders". Nobody even knew about these statements except members of the group and the informant. Once these "threats" became an actual "plan", Mr. Bellar was gone and not involved. He never put plans in motion to harm any government officials, law enforcement officers, or any other citizens of Michigan. Nor did he ever make any statements available to the public at large to create fear or disruptions.

The People cite *People v Byczek*, ___ Mich App ___;2021 WL1822804 (May 6, 2021), a copy of which is attached to this objection. This case does state that this is a general intent crime, however; this case further illustrates why the District Court was correct in its ruling to deny the bind over on that charge. In *Byczek*, the court states:

> To summarize, to demonstrate that a defendant is guilty of making a terrorist threat under MCL 750.543m(1) the prosecution must prove that the defendant (1) threatened to commit an act of terrorism, and (2) communicated the threat to another person. MCL 750.543m(1)(a). An act of terrorism is a willful and deliberate act that (1) would be a violent felony under the laws of this state, (2) is an act that the defendant knows or has reason to know is dangerous to human life, and (3) is an act that is **intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion**. MCL 750.543b(a). The prosecution is not required to prove that the defendant had the intent or the capability to actually carry out the threatened act of terrorism, MCL 750.543m(2), but the prosecution must prove the defendant's general intent to communicate a true threat, that is, the "communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" made with "**an intent to intimidate or coerce.**" Osantowski, 274 Mich. App. at 603, 605, 736 N.W.2d 289.6 (*Id.* At 5)

Every case that has been cited by the People have one very important distinction from the case at bar. Unlike the case at bar, all the threats in those cases cited were actually sent to someone else, either via phone, text, social media, etc. and caused fear or concern. In this case, the "threats" were only sent through secure website, private social media, or during member only meetings. The only individuals aware of these "threats" were the like minded individuals in this group, the FBI and the FBI's informant. The People have no evidence to support otherwise.

The People also cite *People v Gerhard*, ___ Mich App ___ (Docket No. 354369, June 24, 2021) Yet again, *Gerhard* , involves a situation where the "threat" was actually communicated to another person that felt fear as a result. In *Gerhard*, the court stated:

> We initially note that the student who reported feeling threatened by defendant's post was apparently not an intended recipient of the post. As a general matter, a person **"may not be punished because [he or she] negligently overlooked the possibility that someone else would show [a person not intended as a recipient] the Snapchat contents." *In re JP*, 330 Mich. App. 1, 18-19, 944 N.W.2d 422 (2019).** However, the evidence at the preliminary examination indicated that defendant had shared his Snapchat post with a large group of students, many of whom did not even know each other, and the student who felt threatened did not see the post only because she had intentionally removed herself from that group following an earlier disagreement with defendant. Furthermore, the post was widely shared on campus. This is clearly not a situation in which a person

shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further. Rather, defendant clearly intended his post to be essentially public. *Gerhard* at 4

Yet again, the case law is clear that the "threat" must actually be posted or shown to another individual, causing some fear, or **"an intent to intimidate or coerce."**

The District Court also did not error as a matter of law in finding that the making and communicating of a terrorist threat statute requires something more than merely communicating that threat to "any other person". The District Court was directly on point with its ruling. Based upon the cases and arguments set forth above, it is clear that the District Court got it right. Furthermore, the statute, as it pertains to "Any other person" is vague and ambiguous. The District Court hit the nail on the head when he said "So as far as the statute goes its–if–if–if someone makes a threat to a one year old, that satisfies the statute?" (PE Tr. Hearing 3-29-21 pg. 19-20) The District Court goes on to say that a 1 year old is a person. This further shows how ambiguous and vague this statute is at it pertains to whom the threat is made.

CONCLUSION

In the case at bar, the threats were never made to anyone other that members of this group. They never created any need to **'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders**, and thus do not fall within the statute. In looking at the threats alleged by the People by Mr. Bellar at page 21 and 22 of their brief, none of them rise to the level of a true threat that was published or spoken to another person to create fear, required by the prevailing case law cited above. Mr. Bellar was never arrested at any rally, never charged with any crimes up until the take down in October of 2020, never injured anyone, never threatened anyone that created fear, never made/had a Molotov cocktail and never attempted to drag the Governor in

the street. This was a bunch of talk, that was set forth in a private setting and not heard by anyone, other than those like minded individuals in his group.

Wherefore; Mr. Bellar respectfully requests that this Honorable Court deny the People's request to amend the information to add the communicating a threat of terrorism.

Respectfully Submitted:

Andrew P. Kirkpatrick, P66842
Attorney for Defendant

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing was served upon Prosecuting Attorney by first class mail and email, on July 19, 2021 at the above address.
I HEREBY DECLARE THAT THE FOREGOING STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Kellie Woods, Secretary to Andrew P. Kirkpatrick